No. 88-1848

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,
Petitioner,
v.
ARLIE GLEN SKELTON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This Court has recognized that actions brought pursuant to a federal statute that provides for an award of attorney's fees may be—and frequently are—compromised prior to judgment for a single lump sum payment that settles both the defendant's liability on the merits and his liability for attorney's fees. *Marek v. Chesney*, 473 U.S. 1 (1985).

The question presented in this case is whether, when a class action is settled in this manner and the court is called upon to fix the portion of the settlement fund to be allocated to attorney's fees, the availability of a "risk multiplier" is governed by this Court's decision in *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711 (1987), or whether—as the court of appeals held—a risk multiplier may routinely be awarded without reference to the standard set forth in *Delaware Valley*.

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

The question presented in this case regarding the scope of this Court's decision in *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711 (1987) (*Delaware*

Valley II), is of obvious importance to state and local governments: they, together with their officials, are among the defendants most frequently sued under federal statutes providing for awards of attorney's fees. *See, e.g.*, 42 U.S.C. § 1988 (authorizing award of attorney's fees in actions brought under the federal civil rights laws). In fact, most of this Court's cases construing fee-shifting statutes have involved fee awards against state and local governments or their officials. See pages 6-7, *infra*.

The court of appeals' conclusion that the limitations established by Congress on the availability of risk multipliers must be ignored when a monetary fund is produced by settlement of a class action prior to judgment—and a fee awarded to class counsel far higher than that permissible under the statutory criteria—will adversely affect *amici* and their members in several ways. Most important, allowing routine awards of risk multipliers will alter the incentive structure established by Congress, "authoriz[ing] the highest fees in cases least likely to be won and hence encouraging the bringing of more risky cases," even though Congress did not want to encourage the filing of such suits. *Delaware Valley II*, 483 U.S. at 725, 726 (plurality opinion). Indeed, because the court of appeals' "exception" to the rule set forth in *Delaware Valley II* appears to apply principally to class actions, the court's approach provides an incentive for the filing of class actions whenever possible, even if the invocation of that complex procedural mechanism is not necessary to serve the interests of those injured by allegedly wrongful conduct.

Second, this legal rule will tend to inflate settlement costs. Plaintiffs' attorneys will put a higher price on settlement so that the dollar value of the monetary fund will be large enough to allow them to recover fees in excess of the amount Congress determined to be proper.

The final, and even more troubling, aspect of the court of appeals' ruling is that government entities, like other defendants, settle cases in large part to confer benefits on the plaintiffs—to compromise past claims and foster an amicable relationship for the future—not to line attorneys' pockets. Indeed, because governmental entities have an overarching responsibility to safeguard the rights of their citizens, they have an additional interest in ensuring that injured parties—rather than their attorneys—obtain as large a share as possible of the public funds expended in settlement of a claim. The decision of the court of appeals authorizes the diversion of large chunks of such settlement funds in the form of excessive attorney's fee awards. Because the court of appeals' decision in this case will thus have a direct effect on several matters of substantial importance to *amici* and their members, *amici* submit this brief to assist the Court in determining whether the petition for a writ of certiorari should be granted.*

STATEMENT

This class action was instituted under the Magnuson-Moss Act, 15 U.S.C. §§ 2301 *et seq.*, on behalf of a class of consumers seeking damages for alleged defects in the transmissions in certain lines of automobiles manufactured by the General Motors Corporation ("GM"). The statute provides in pertinent part that "[i]f a consumer finally prevails" in an action under the statute, he may recover as part of the judgment "a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended)." 15 U.S.C. § 2310(d)(2).

GM settled the case prior to trial. The settlement established a $17 million fund to reimburse the class members for service and repair costs resulting from trans-

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* The parties' letters of consent, pursuant to Rule 36 of the Rules of this Court, have been filed with the Clerk.

mission failure. It further provided that attorney's fees for plaintiffs' counsel would be paid solely from the settlement fund; the determination of the amount of fees was left to the court. Any portion of the settlement fund remaining after distribution to the class members and payment of the attorney's fees would revert to GM.

The district court limited the attorney's fee award to the lodestar amount, rejecting the request of plaintiffs' counsel for a "risk multiplier." The court stated that "the standards for determining reasonable attorneys' fees in common fund cases and statutory fee cases should not be significantly different" (Pet. App. 29a (footnote omitted)). Because the action was commenced under the Magnuson-Moss Act, "any limitation contained in the * * * Act is a relevant consideration in determining whether to award a 'risk' multiplier in this case. The structure of the settlement agreement should not divert the court from the Congressional intent underlying the passage of this Act" (*id.* at 57a-58a).

The district court concluded that the "plain language" of the Magnuson-Moss Act bars a risk multiplier for fees awarded under that statute (Pet. App. 58a). Even if a multiplier were permissible, the court added, it was not appropriate on the facts of this case (*id.* at 59a-65a).

The court of appeals reversed, holding that "the fee-shifting provision of the Magnuson-Moss Act should [not] affect the fee determination in this case" (Pet. App. 9a). Instead, according to the court of appeals, "when a settlement fund is created in exchange for release of the defendant's liability both for damages and for statutory attorneys' fees, equitable fund principles must govern the court's award of the attorneys' fees" (*id.* at 12a).

The court of appeals directed the district court to redetermine the multiplier issue without reference to the factors set forth in this Court's decision in *Delaware Valley II* (see Pet. App. 14a-16a). On remand, the district court approved a multiplier of 1.6 (*id.* at 69a-72a), which resulted in an additional $1.2 million in attorney's fees.

ARGUMENT

I. THE COURT OF APPEALS' DECISION SHOULD BE REVIEWED BY THIS COURT BECAUSE IT CREATES CONSIDERABLE UNCERTAINTY REGARDING AN IMPORTANT ISSUE IN ATTORNEY'S FEE LITIGATION AND THREATENS TO SUBJECT STATE AND LOCAL GOVERNMENTS TO THE VERY BURDENS THAT THIS COURT SOUGHT TO ELIMINATE THROUGH ITS DECISION IN *DELAWARE VALLEY II*

This Court in *Delaware Valley II* addressed the availability of risk multipliers under federal fee-shifting statutes; that decision provides guidance concerning the circumstances in which award of a multiplier is proper, resolving the considerable confusion regarding that issue that had developed in the lower courts. The court of appeals' holding that *Delaware Valley II* does not apply in determining how much of a lump-sum settlement may be allocated to attorney's fees reintroduces much of the confusion over the availability of risk multipliers that led the Court to hear *Delaware Valley II* in the first place and, in addition, subjects defendants to the litigation burdens that *Delaware Valley II* sought to eliminate. This Court should grant review in the present case—as it did in *Delaware Valley II*—to consider whether the court below correctly determined that attorney's fee awards may be calculated in a manner that leads to these disturbing consequences.

Litigation over attorney's fees has become a staple of modern civil practice. Approximately 200 federal statutes authorize awards of attorney's fees; included among these are several statutes invoked by plaintiffs with considerable frequency. See 1 M. Derfner & A. Wolf, *Court Awarded Attorney Fees* 5-3 to 5-7 (1989). In view of the large number of cases in which courts award attorney's fees under fee-shifting statutes, it is especially important that there be as little confusion as possible regarding the legal standards governing fee awards. Moreover, the particular circumstance involved in this case—payment of a single sum to settle both the plaintiffs' damages claim and the attorney's fee issue—is a common form of settlement in cases in which federal law subjects the defendant to liability for fees. *Evans v. Jeff D.*, 475 U.S. 717, 733-737 (1986). Clarity in the law is especially important in this frequently recurring context.

The general significance of these issues is greatly magnified for state and local governments because, together with their officials, they are much more likely than the ordinary civil litigant to find themselves named as defendants in actions brought under federal statutes that authorize an award of attorney's fees to the prevailing party. The statute providing for attorney's fee awards in actions under the federal civil rights laws, 42 U.S.C. § 1988, accounts for much of the fee litigation against state and local governments; and this Court's docket amply substantiates how frequently these entities are held liable for attorney's fees. Most of the decisions construing federal fee-shifting statutes have come in cases involving fee awards assessed against a state or local government or official. *See, e.g., Missouri v. Jenkins*, No. 88-64 (U.S. June 19, 1989); *Texas State Teachers Ass'n v. Garland Independent School District*, 109 S. Ct. 1486 (1989); *Blanchard v. Bergeron*, 109 S. Ct. 939 (1989); *Delaware Valley II*, *supra*; *Hewitt v. Helms*, 482 U.S. 755 (1987); *City of Riverside v.*

Rivera, 477 U.S. 561 (1986); *Evans v. Jeff D.*, *supra*; *Kentucky v. Graham*, 473 U.S. 159 (1985); *Spencer v. South Carolina Tax Comm'n*, 471 U.S. 82 (1985) (per curiam); *Blum v. Stenson*, 465 U.S. 886 (1984); *Hensley v. Eckerhart*, 461 U.S. 425 (1983). Because the same legal standards generally apply under all free-shifting statutes (*Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 559-560 (1986)), the rule adopted in the present case may govern the availability of risk multipliers in actions against state and local governments under other federal statutes. *Cf. McGuire v. Sullivan*, 873 F.2d 974 (7th Cir. 1989) (invoking rule adopted by court below to interpret provision of the Social Security Act regarding award of attorney's fees).

The Seventh Circuit's conclusion that *Delaware Valley II*'s principles regarding the availability of risk multipliers are irrelevant in cases in which both the liability and attorney's fee issues are settled at the same time creates considerable confusion with respect to the adjudication of attorney's fee issues in the large class of cases in which such settlements are reached. As noted in the petition for certiorari (at 14-15), other courts of appeals have held that the *Delaware Valley II* standard applies even if a case is settled.

Moreover, the court's decision essentially provides a road map to plaintiffs' class counsel interested in circumventing the limits on risk multipliers established by *Delaware Valley II*. All that counsel must do is enter into a lump sum settlement. Under the court of appeals' approach, the district court will then be able to award a multiplier that would have been impermissible had the attorney's fee question been litigated directly under the fee-shifting statute.

State and local governments are likely to feel the brunt of the multiple litigation burdens that will result from the approach taken by the court of appeals in this case. First, allowing risk multipliers on a more liberal basis

significantly alters the incentives for commencing lawsuits under federal statutes that have fee-shifting provisions. A key element of the rationale of the *Delaware Valley II* plurality was that risk multipliers should be curtailed to avoid providing an incentive for the bringing of marginal claims. 483 U.S. at 725-726 (plurality opinion); *see also id.* at 733-734 (O'Connor, J., concurring). Expanding the availability of multipliers beyond the bounds fixed in *Delaware Valley II*, as the court of appeals has done here, will have precisely the opposite effect, encouraging plaintiffs' attorneys to institute "long-shot" actions in the hope that, if such a claim is successful, they will receive a large risk multiplier. In addition, because the court of appeals' approach appears to apply principally to settlement funds generated by class actions, these marginal claims will likely be clothed in class action garb, and therefore carry with them the difficult procedural rules—and extra costs—associated with that type of complex litigation.

Second, ignoring *Delaware Valley II*'s limitations on risk multipliers will lead to complex litigation over the proper amount of the multiplier in each individual case. As both the plurality and Justice O'Connor observed in *Delaware Valley II*, "in order to determine the proper size of the contingency bonus, a court must retroactively estimate the prevailing party's chances for success from the perspective of the attorney when he first considered filing the suit. Not only is this mathematically difficult to compute, but 'once the result is known, it is hard for judges and lawyers to regain a perspective of ignorance and to treat the result as only one of several that were initially possible.'" 483 U.S. at 722 (plurality opinion; citation omitted); *see also id.* at 732 (O'Connor, J., concurring). The Court has repeatedly cautioned that fee disputes "should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. at 437.

Finally, the court of appeals' rule is likely to increase settlement costs. Class counsel will place a greater settle-

ment value upon a case because of the larger attorney's fee available under the non-*Delaware Valley II* framework. These higher costs will of course adversely affect state and local governments that enter into such settlements. In some cases, the higher costs may actually obstruct settlement: one incentive for a defendant to settle a case is avoiding the costs of litigation, chief among which are attorney's fees. Impairing settlements will not only adversely affect state and local governments by requiring them to litigate to judgment, but will in some cases thwart the will of Congress. *Cf. Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

It may be argued that the cost of settlement need not increase because the plaintiffs' compensation can be reduced to pay the larger attorney's fee. This alternative is in some ways even more unpalatable. It would set up an inherent conflict of interest between class counsel and the members of the plaintiff class. If a case is litigated to final judgment and fees sought directly under the statute, counsel could obtain a risk multiplier only by satisfying the stringent *Delaware Valley II* standard; also, the fee award would not reduce the amount of the plaintiffs' recovery. If, however, the case is settled prior to judgment, counsel has the opportunity to pocket a larger fee, because *Delaware Valley II*'s limitations on risk multipliers would not apply. In addition, the fee award would reduce the amount of the settlement fund disributed to the class members. Thus, counsel has a considerable personal incentive to reach a settlement, because of the larger fees likely to be awarded, even if settlement would not be in the best interests of the class. There is no justification for adopting a legal rule that gives plaintiffs' lawyers a strong economic incentive to act against the interests of their clients.

State and local governments—like all defendants—have a strong interest in ensuring that funds expended in settlement of a claim actually go toward ameliorating

the damage suffered by the plaintiff. They hope that the amicable resolution of a dispute will engender goodwill and place the relationship between the parties on a positive footing for the future. In the case of government entities, this interest is supplemented by their responsibility to safeguard the rights of their citizens. Because the court of appeals' rule would divert to attorneys more of these funds, without authorization by Congress, it interferes with these interests in controlling the use of settlement payments.

In sum, the court of appeals' decision recreates the uncertainty regarding the availability of risk multipliers that this Court sought to eliminate when it decided *Delaware Valley II*. Because of that uncertainty, and the practical burdens imposed upon defendants in general—and state and local governments in particular—by the rule adopted by the court of appeals, this Court should grant the petition and consider the applicability of *Delaware Valley II* to the settlement context.

II. THE COURT OF APPEALS ERRED IN AUTHORIZING WHOLESALE CIRCUMVENTION OF THIS COURT'S DECISION IN *DELAWARE VALLEY II*

The court of appeals' decision is not only important, it is also plainly wrong on the merits. The decision rests entirely on the conclusion that a court sitting in equity to allocate the proceeds of a settlement fund may ignore Congress's standards for determining a reasonable attorney's fee. That conclusion is erroneous.

Federal fee-shifting statutes generally authorize a "prevailing party" to seek an award of fees; a plaintiff who obtains relief pursuant to a settlement usually qualifies as a "prevailing party." *Maher v. Gagne*, 448 U.S. 122, 129 (1980). And a fee award directly under such a statute would, of course, be limited by *Delaware Valley II*. Federal fee-shifting statutes thus permit risk multi-

pliers to only a limited degree, if at all, when a plaintiff prevails by virtue of settlement.

The court of appeals' startling conclusion that this statutory principle must be cast aside in this case rests on the fact that the fees here were not awarded directly under the statute, but instead were awarded on an equitable "common fund" theory. But surely a court of equity must accord considerable weight to Congress's considered judgment as to the measure of a reasonable attorney's fee, especially where Congress prescribed the standard governing availability of risk multipliers in cases in which an action under a statute with a fee-shifting provision culminates in a settlement favorable to the plaintiff.

This Court previously has invoked the principle that "equity follows the law" in requiring federal courts to exercise their equitable powers in line with standards set forth by Congress. *See, e.g., INS v. Pangilinan*, 108 S. Ct. 2210, 2215-2216 (1988); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 576-577 n.9 (1984); *see also In re Fulghum Construction Corp.*, 706 F.2d 171, 173 (6th Cir.) (application of equitable doctrine "must 'comport to and remain compatible with the prevailing legislative intent'") (citation omitted), *cert. denied*, 464 U.S. 935 (1983). Here too, courts should adhere to the standard prescribed by Congress in exercising their equitable authority to award a reasonable attorney's fee. Because the court of appeals substituted its own rules for Congress's considered limitations on attorney's fee awards, its judgment should be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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